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2
3 **UNITED STATES DISTRICT COURT**
4 **WESTERN DISTRICT OF WASHINGTON**

5 UNITED STATES OF AMERICA, THE
6 STATE OF WASHINGTON,
7 SUQUAMISH TRIBE,

8 Plaintiffs,

9 v.

10 FOSS MARITIME COMPANY,

11 Defendant.

NO.

CONSENT DECREE

12
13 This Consent Decree is made and entered into by and between the United States of
14 America, on behalf of the Department of Commerce, by the National Oceanic and
15 Atmospheric Administration (“NOAA”); the Department of the Interior (“DOI”); the State of
16 Washington, by the Department of Ecology; the Suquamish Tribe; and Foss Maritime
17 Company, a Washington corporation (“Settling Defendant”).

18 **INTRODUCTION**

19 A. On December 30, 2003, at approximately 12:05 a.m., a spill occurred into Puget Sound
20 during loading of oil onto the Foss tank barge 248-P2 at the Point Wells terminal in Shoreline,
21 Washington (hereinafter referred to as the “Foss 2003 Oil Spill”). A comprehensive overview
22 of the incident, clean-up efforts, extent of oiling, and assessment efforts is described in the
23 May 2004 report entitled *Data Collected to Support Response and NRDA Activities for the*
24 *Foss 248-P2 Oil Spill of December 30, 2003*. A copy of this report is available at
25 <http://www.entrix.com/foss/index.htm>.
26

1 B. The United States Coast Guard notified Settling Defendant by letter, dated
2 January 7, 2004, that Settling Defendant was designated as the responsible party for the Foss
3 2003 Oil Spill. Under the federal Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. §§ 2701 *et seq.*
4 (2006) and its implementing regulations, 15 C.F.R. Part 990 (2006), and the Washington State
5 Water Pollution Control Act (RCW 90.48) (2007) and its implementing regulations,
6 Washington Administrative Code Chapter 173-183 (2007), the responsible party is liable for
7 the costs of conducting a natural resource damage assessment (“NRDA”), as well as the costs
8 of implementing the preferred restoration action(s) identified in the final restoration plan.
9

10 C. On February 9, 2004, NOAA invited Settling Defendant to participate in a
11 cooperative NRDA process. On March 11, 2004, the State of Washington also formally
12 requested that Settling Defendant participate in the State’s resource damage assessment
13 (“RDA”) process. Settling Defendant formally agreed to jointly participate in both the NRDA
14 and RDA processes (on February 11, 2004, and April 27, 2004, respectively).
15

16 D. The United States of America, through NOAA (the Department of Commerce)
17 and the Department of the Interior (“DOI”) (collectively, the “Federal Trustees”); the State of
18 Washington, including the Department of Natural Resources, the Department of Fish and
19 Wildlife, the Department of Health, the Parks and Recreation Commission, the Office of
20 Archaeology and Historic Preservation, headed by the Department of Ecology, as lead State
21 Trustee acting on behalf of the Washington State RDA Committee (collectively, the “State
22 Trustee”); and the Suquamish Indian Tribe (the “Tribal Trustee”) (collectively, the “Trustees”)
23 are the Trustees for the natural resources allegedly affected by the Foss 2003 Oil Spill and
24 belonging to, managed by, controlled by, or appertaining to the United States, the State of
25
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1 Washington, and the Suquamish Indian Tribe, respectively. Each Federal and State Trustee is
2 authorized to act on behalf of the public and the Tribal Trustee is authorized to act on behalf of
3 the tribe and its members to protect and restore natural resources that have been allegedly
4 threatened and/or damaged by the release of oil. The DOI has agreed to act as lead Trustee for
5 the Foss 2003 Oil Spill.
6

7 E. ENTRIX, Inc., an environmental consulting firm retained by Settling
8 Defendant, in consultation with the Trustees, prepared a draft *Damage Assessment and*
9 *Restoration Plan for the Foss 248-P2 Oil Spill on December 30, 2003* ("draft DARP"), dated
10 May 2004. The draft DARP included a preliminary assessment of the potential injuries to
11 natural resources, and/or their services, resulting from the Foss 2003 Oil Spill and proposed
12 restoration projects to restore and/or compensate for any such injuries pursuant to OPA, 15
13 C.F.R. Part 990, and under state law pursuant to RCW 90.48. The Trustees made a preliminary
14 determination that five (5) of the proposed restoration projects, when taken together, would
15 provide full compensation for any alleged damages to natural resources incurred by the Foss
16 2003 Oil Spill. The Trustees used these projects as the basis for determining the amount of
17 Natural Resource Damages to be paid for all potential injury to natural resources caused by the
18 Foss 2003 Oil Spill. The five proposed restoration projects are identified in Appendix A to this
19 Consent Decree.
20
21

22 F. Trustees have filed, contemporaneously with the lodging of this Consent
23 Decree, a civil complaint alleging that Settling Defendant discharged oil into the navigable
24 waters of the United States, including waters of the State of Washington. An Answer has not
25 been filed, there has not been a trial on any issue of fact or law in this case, and this Consent
26

1 Decree shall not be construed as an admission of liability or responsibility for any releases of
2 oil, cost of remedial action, or natural resource damage, nor an admission of any facts related
3 thereto.

4
5 G. The Parties agree that settlement of these civil matters, by facilitating timely
6 restoration and avoiding the costs and risks of litigation, is in the public interest, and that entry
7 of this Consent Decree is the most appropriate means of resolving these matters.

8
9 H. The Parties agree, and by entering into this Consent Decree the Court finds, that
10 settlement of this matter as provided for in this Consent Decree is fair, reasonable and in the
11 public interest. In signing this Consent Decree, Settling Defendant agrees to its entry and
12 agrees to be bound by its terms.

13 The Court is fully advised of the reasons for the entry of this Consent Decree. And
14 NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

15
16 **I. JURISDICTION AND VENUE**

17 1. The Plaintiffs have alleged that this Court has jurisdiction over the subject
18 matter and over the Parties to this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1367 and
19 Section 1017(b) of OPA, 33 U.S.C. § 2717(b), and that the Court has personal jurisdiction over
20 the Settling Defendant and that venue lies in this District pursuant to 28 U.S.C. § 1391(b), and
21 (c) and 33 U.S.C. § 2717(b). For the purposes of this Consent Decree, only, Settling
22 Defendant waives all objections and defenses that they may have to jurisdiction of the Court or
23 to venue in this District.

1 c. "Date of Lodging" shall mean the date that this Consent Decree is lodged with
2 the Court for public comment.

3 d. "Day" shall mean a calendar day unless expressly stated to be a working day.
4 "Working Day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In
5 computing any period of time under this Consent Decree, where the last day would fall on a
6 Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the
7 next business day.

8 e. "Effective Date" shall mean the date on which the District Court has approved
9 and entered this Consent Decree as a judgment.

10 f. "Foss 2003 Oil Spill" means the oil spill into Puget Sound that occurred on
11 December 30, 2003, at approximately 12:05 a.m. during the loading of oil onto the Foss tank
12 barge 248-P2 at the Point Wells terminal in Shoreline, Washington.

13 g. "Natural Resource" or "Natural Resources" shall mean land, fish, wildlife,
14 biota, air, water, ground water, drinking water supplies, and other such resources, belonging to,
15 managed by, held in trust by, appertaining to, or otherwise controlled by the Trustees.

16 h. "Natural Resource Damages" means damages, including costs of damages
17 assessment, recoverable under Section 1002 of OPA, 33 U.S.C. § 2702 or RCW 90.48 for
18 injury to, destruction of, or loss of any or all natural resources resulting in whole or in part
19 from the release or threatened release of oil from the Foss 2003 Oil Spill.

20 i. "NRDAR Fund" means DOI's Natural Resource Damage Assessment and
21 Restoration Fund.

22 j. "OPA Fund" shall mean the Oil Spill Liability Trust Fund as defined in Section
23 1001 of OPA, 33 U.S.C. § 2701(11).

24 k. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic
25 numeral or an upper or lower case letter.

26 l. "Parties" refers collectively to Foss Maritime Company and the Trustees.

1 m. "Project Sponsor(s)" means the local government, state agency or Indian tribe
2 that is a recipient of funds to implement a specific restoration project.

3 n. "Section" means a portion of this Consent Decree identified by a Roman
4 numeral.

5 o. "Settling Defendant" shall mean Foss Maritime Company.

6 p. "Trustees" or "Plaintiffs" shall mean the United States of America, on behalf of
7 the Department of Commerce, by the National Oceanic and Atmospheric Administration
8 ("NOAA") and the Department of the Interior ("DOI"); the State of Washington, by the
9 Department of Ecology; and the Suquamish Indian Tribe.

10
11 **IV. PAYMENTS BY SETTLING DEFENDANT**

12 5. Within thirty (30) days after this Consent Decree has been lodged with this
13 Court, Settling Defendant shall deposit \$265,281.00 (Two Hundred Sixty-Five Thousand Two
14 Hundred Eighty-One Dollars) plus anticipated applicable wire transfer and related bank fees
15 into an escrow account bearing interest in accordance with 28 U.S.C. § 1961, in a federally-
16 chartered bank ("Escrow Account"). If the Consent Decree is not entered by this Court, and
17 the time for any appeal of that decision has run, or if this Court's denial of entry is upheld on
18 appeal, the monies placed in escrow, together with accrued interest thereon, shall be returned
19 to Settling Defendant. If the Consent Decree is entered by this Court, Settling Defendant shall,
20 within thirty (30) days of the Effective Date, cause the monies in the Escrow Account, and all
21 accrued interest thereon (less applicable wire transfer and related bank fees), to be paid to the
22 Trustees as Natural Resource Damages for all alleged injuries to natural resources resulting
23 from the Foss 2003 Oil Spill. Such payment shall be made by FedWire Electronic Funds
24 Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT
25 procedures, referencing DOJ Case Number 90-5-1-1-08642, USAO No. 2008V00133,
26 NRDAR Account No. 14X5198, and "Natural Resource Damages for Foss/Point Wells 2003

1 Oil Spill.” Payment shall be made in accordance with instructions provided to the Settling
2 Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the
3 Western District of Washington after the lodging of this Consent Decree. Any payments
4 received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the
5 next business day.

6 6. At the time of payment, the Settling Defendant shall send written notice of
7 payment and a copy of any transmittal documentation to the Trustees in accordance with
8 Section XIII (Notice).

9 7. Funds from this payment shall be used exclusively to pay the costs of
10 implementing the restoration projects selected by the Trustees using the process outlined in
11 Section V below.

12 8.a. Within thirty (30) days after this Consent Decree has been lodged with the
13 Court, Settling Defendant shall deposit an additional \$99,226.67 plus applicable wire transfer
14 and related bank fees into the Escrow Account. Of the \$99,226.67 total, \$26,226.67 is to
15 reimburse NOAA and DOI for past reasonable assessment costs related to the NRDA process,
16 as defined in 15 C.F.R. § 990.30 and W.A.C. § 173-183-100(32). The remaining \$73,000.00 is
17 for estimated future assessment costs for all Trustees. If the Consent Decree is not entered by
18 this Court, and the time for any appeal of that decision has run, or if this Court’s denial of entry
19 is upheld on appeal, the monies placed in escrow, together with accrued interest thereon, shall
20 be returned to Settling Defendant. If the Consent Decree is entered by this Court, Settling
21 Defendant shall, within thirty (30) days of the Effective Date, cause the monies in the Escrow
22 Account, and all accrued interest thereon (less applicable wire transfer and related bank fees),
23 to be paid to the Trustees. Such payment shall be made by FedWire Electronic Funds Transfer
24 (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures,
25 referencing DOJ Case Number 90-5-1-1-08642, USAO No. 2008V00133, NRDAR Account
26 No. 14X5198, and “Natural Resource Damage Assessment Costs for Foss/Point Wells 2003

1 Oil Spill.” Payment shall be made in accordance with instructions provided to the Settling
2 Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the
3 Western District of Washington. Any payments received by the Department of Justice after
4 4:00 p.m. (Eastern Time) will be credited on the next business day.

5 b. Within thirty (30) days of the Effective Date, Settling Defendant shall pay the
6 Washington State Department of Health \$17,615.00 for past reasonable assessment costs.
7 Payment shall be made by certified check payable to the Washington State Department of
8 Health and bearing the notation “Foss/Point Wells Assessment Costs” and the following
9 reference codes: Major Group = 09; Major Source = 25; and Fund = 001. The check shall be
10 mailed to:

11 Department of Health
12 Revenue Office
13 PO Box 47901
14 Olympia, WA 98504-7901
15 Attn: Marlena Nash

16 9. The Trustees acknowledge that Settling Defendant has previously paid for the
17 following NRDA past assessment costs:

- 18 a. \$8,043.26 paid to the State Trustee pursuant to Order for Reimbursement of
19 Expenses No. 2914; and
20 b. \$25,723.00 paid to the Tribal Trustee pursuant to its letter demand dated
21 January 18, 2005; and
22 c. \$10,203.58 paid to United States Fish and Wildlife Service pursuant to its
23 cost reimbursement requests dated January 27, 2005 and March 30, 2006.

24 10. The Trustees warrant that amounts paid by Settling Defendant pursuant to this
25 Consent Decree are not a duplication of and/or do not overlap with any costs included in
26 Paragraph 9 above. In the event that it is determined in the future that Settling Defendant has
made any duplicate payment(s) for the NRDA-related costs pursuant to this Consent Decree,

1 the Trustee receiving such duplicate payment(s) shall promptly reimburse Settling Defendant
2 for such duplicate payment(s), subject to Paragraph 11 below.

3 11. The Parties to this Consent Decree recognize and acknowledge that any
4 obligation of the United States under this Consent Decree can only be performed using
5 appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be
6 interpreted or construed as a commitment or requirement that the United States obligate or pay
7 funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable
8 provision of law.

9
10 **V. COMPLETION OF THE DARP AND IDENTIFICATION OF**
11 **RESTORATION PROJECTS**

12 12. At no further cost to Settling Defendant, the Trustees will finalize the *Damage*
13 *Assessment and Restoration Plan for the Foss 248-P2 Oil Spill on December 30, 2003*
14 (“DARP”) and conduct the public review processes required by OPA, the National
15 Environmental Policy Act, 42 U.S.C. §§ 4371 et seq. (“NEPA”), and Washington’s State
16 Environmental Policy Act, RCW Chapter 43.21C (“SEPA”). The Trustees will review the
17 status of the projects identified in Appendix A, and will include in the draft DARP made
18 available for public review and comment each of the projects the Trustees determine to be still
19 feasible and desirable. Once the applicable public processes of OPA, NEPA and SEPA have
20 been completed, the Trustees will select the preferred restoration project(s) and work with
21 Project Sponsors to implement the preferred restoration project(s).

22 13. Prior to releasing to the public the below-listed documents related to the Foss
23 2003 Oil Spill, the Trustees shall make good faith efforts to provide Settling Defendant with a
24 reasonable opportunity to review and comment on the documents. If the Trustees determine it
25 is appropriate, they may incorporate such comments into the document.

26 a. Draft Restoration Plan/Environmental Assessment;

1 b. News release(s) notifying the public that the Draft Restoration
2 Plan/Environmental Assessment is available for comment;

3 c. Federal Register notice(s) that the Draft Restoration Plan/Environmental
4 Assessment is available for review;

5 d. News release(s) notifying the public that the Restoration Plan/Environmental
6 Assessment has been finalized after public comment has been addressed; and

7 e. Any other similar document that Settling Defendant reasonably requests to
8 review and comment on and as to which the Trustees agree to provide for such review and
9 comment, such agreement not to be unreasonably withheld.

10
11 **VI. COVENANT NOT TO SUE BY PLAINTIFFS**

12 14. The United States, State of Washington and Suquamish Tribe covenant not to
13 sue or to take civil or administrative action against Settling Defendant for Natural Resource
14 Damages related to the Foss 2003 Oil Spill under OPA or RCW 90.48, except as specifically
15 reserved in Section VII (Reservation of Rights) below. This covenant not to sue is conditioned
16 upon satisfactory performance by the Settling Defendant of its obligations under this Consent
17 Decree.

18 15. In consideration of the payment specified herein and effective upon payment in
19 full of such obligation by Settling Defendant, the Suquamish Tribe (subject to the terms of the
20 February 9, 2007 Settlement Agreement between Settling Defendant and the Suquamish Indian
21 Tribe, which fully and completely settled the Suquamish Indian Tribe's claims for damage to
22 tribal property, Natural Resource Damages and other interests), hereby releases and covenants
23 not to sue or take any legal action against Settling Defendant for Natural Resource Damages
24 related to the Foss 2003 Oil Spill under OPA or RCW 90.48, except as specifically reserved in
25 Section VII (Reservation of Rights) below. This covenant not to sue is conditioned upon
26

1 satisfactory performance by the Settling Defendant of its obligations under this Consent
2 Decree.

3 16. The United States covenants not to sue or take civil or administrative action
4 against the State of Washington or Suquamish Indian Tribe for costs incurred or to be incurred
5 by the Trustees in assessing Natural Resource Damages resulting from the Foss 2003 Oil Spill.
6 This covenant takes effect upon entry of this Consent Decree by the Court.

7 17. The State of Washington covenants not to sue or take civil or administrative
8 action against the United States or Suquamish Indian Tribe for costs incurred or to be incurred
9 by the Trustees in assessing Natural Resource Damages resulting from the Foss 2003 Oil Spill.
10 This covenant takes effect upon entry of this Consent Decree by the Court.

11 18. The Suquamish Indian Tribe covenants not to sue or take civil or administrative
12 action against the United States or the State of Washington for costs incurred or to be incurred
13 by the Trustees in assessing Natural Resource Damages resulting from the Foss 2003 Oil Spill.
14 This covenant takes effect upon entry of this Consent Decree by the Court.

15
16 **VII. RESERVATION OF RIGHTS**

17 19. Notwithstanding any other provision of this Consent Decree, the covenants not
18 to sue in Paragraphs 14 and 15 shall not apply to any other claims, causes of action or matters,
19 including but not limited to:

20 a. Claims or causes of action based on Settling Defendant's failure to satisfy any
21 requirement of this Consent Decree.

22 b. Claims or causes of action brought against Settling Defendant by the United
23 States or Washington State for criminal liability associated with the Foss 2003 Oil Spill;

24 c. Claims or causes of action brought by the United States or State of Washington
25 seeking to impose civil penalties relating to the Foss 2003 Oil Spill;

1 d. Claims or causes of action for any releases other than those identified as
2 resulting from the Foss 2003 Oil Spill.

3 e. Claims or causes of action for recovery of up to \$10,456.59 plus interest in
4 damage assessment costs relating to the Foss 2003 Oil Spill paid by the OPA Fund, per OPA
5 §§ 2715(a) and (c).

6 f. Claims or causes of action for injunctive relief or any other costs incurred or to
7 be incurred by the United States or by the State of Washington that are not within the
8 definition of Natural Resource Damages including but not limited to: claims for lost public
9 services and removal and cleanup efforts associated with the Foss 2003 Oil Spill, per OPA §§
10 2702(b)(1) and (b)(2)(F) and/or the federal Clean Water Act, 33 U.S.C. §§ 1311 and 1321.

11
12 **VIII. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

13 20. Except as provided in Paragraphs 21 and 22 below, the Settling Defendant
14 hereby covenants not to sue or to assert any claims or causes of action against the Plaintiffs
15 (including all employees, agents, contractors, departments, agencies, administrations and
16 bureaus of any of them), related to the Foss 2003 Oil Spill, including, without limitation, any
17 potential or pending claims existing on the date of this Consent Decree against the OPA Fund
18 relating to the Foss 2003 Oil Spill.

19 21. The covenant not to sue set forth in the preceding Paragraph shall not apply to
20 any action by Settling Defendant that is necessary to secure or enforce its rights provided
21 pursuant to the terms and conditions of the February 9, 2007 Settlement Agreement between
22 Settling Defendant and the Suquamish Indian Tribe.

23 22. Settling Defendant reserves the right to defend itself against any future claim(s)
24 or cause(s) of action brought by any of the Trustees and/or the OPA Fund related to the Foss
25 2003 Oil Spill.

1 23. In this or any other action brought by the Plaintiffs, Settling Defendant shall not
 2 assert, and may not maintain, any defense or claim based upon the principles of waiver, *res*
 3 *judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any
 4 contention that the claims raised by the Plaintiffs in the subsequent proceeding were or should
 5 have been brought in the instant case; provided, however, that nothing in this Paragraph affects
 6 the enforceability of the Covenant Not to Sue by Plaintiffs set forth in Section VI.

7
 8 **IX. CLAIMS AGAINST THE OIL SPILL LIABILITY TRUST FUND**

9 24. Except as provided in Paragraph 25 below, all Parties covenant not to present
 10 any claim for Natural Resource Damages arising from the Foss 2003 Oil Spill, pursuant to
 11 OPA, 33 U.S.C. §§ 2708 and 2713, to the OPA Fund.

12 25. The United States reserves the right to seek compensation for up to \$ 10,456.59
 13 plus interest from the OPA Fund, which the United States asserts are additional NRDA costs
 14 related to the Foss 2003 Oil Spill which the United States believes are reasonable but which
 15 Settling Defendant challenges as not meeting the requirements of reasonable assessment costs,
 16 as defined in 15 C.F.R. § 990.30 and WAC § 173-183-100(32). Settling Defendant reserves
 17 the right to challenge the costs set forth in Paragraph 19.e. above.

18
 19 **X. STIPULATED PENALTIES AND INTEREST FOR LATE PAYMENTS**

20 26. If any payment required by Section IV of this Consent Decree is not made by
 21 the date specified in that Section, Settling Defendant shall be liable for the following stipulated
 22 penalties for each day such payment is late:.

<u>Days Late</u>	<u>Penalty</u>
1-10	\$2,000/day
11-59	\$3,000/day
Beyond 60 days	\$4,000/day

1 27. In addition to the stipulated penalties provided in this Section, if any payment
2 required by Section IV, or by this Section of this Consent Decree is not made by the date it is
3 due, Settling Defendant shall be liable for interest (as defined by 33 U.S.C. § 2705(b)(4)) on
4 the amount due.

5 28. Stipulated penalties and interest are due within thirty (30) days following
6 receipt by Settling Defendant of a written demand by any of the Plaintiffs for late payment of
7 such stipulated penalties and/or Interest.

8 29. Penalties and interest shall accrue as provided in this Paragraph regardless of
9 whether Plaintiffs have notified Settling Defendant of the violation or made a demand for
10 payment, but need only be paid upon demand. All penalties shall begin to accrue on the day
11 after payment was due and shall continue to accrue through the day that payment of amounts
12 owed is finally made. Nothing herein shall prevent the simultaneous accrual of separate
13 penalties for separate violations of this Consent Decree.

14 30. All stipulated penalties and interest owed by Settling Defendant with respect to
15 late payment of past costs to the United States shall be paid to the United States. All stipulated
16 penalties and interest owed by Settling Defendant with respect to payments to the State of
17 Washington shall be paid to the State of Washington. All other stipulated penalties and interest
18 owed by Settling Defendant shall be paid to the NRDAR Fund. All payments of stipulated
19 penalties and interest shall be made as follows:

20 a. To the United States: by certified or cashier's check payable to the
21 "U.S. Department of Justice" and delivered to:

22 Chief, Environmental Enforcement Section
23 Environment and Natural Resources Division
24 U.S. Department of Justice
25 P.O. Box 7611
26 Washington, D.C. 20044-7611

 The following information is to be included with the check:
 DJ No. 90-5-1-1-08642
 Re: Stipulated penalties for "Foss/Point Wells 2003 Oil Spill."

1
2 b. To the State of Washington by certified or cashier's check payable to the
3 State of Washington Department of Ecology and delivered to:

4 Attention: Cashiering Section
5 P.O. Box 5128
6 Lacey, WA 98503-0210

7 The following information is to be included with the check:
8 Re: Stipulated penalties for "Foss/Point Wells 2003 Oil Spill."

9 c. To the NRDAR Account: by certified or cashier's check payable to the
10 "U.S. Department of the Interior" and delivered to:

11 U.S. Department of the Interior
12 NBC/Division of Financial Management Services
13 Branch of Accounting Operations
14 Mail Stop D-2777
15 7401 W. Mansfield Avenue
16 Lakewood, CO 80235

17 The following information is to be included with the check:
18 Account No. 14X5198
19 Re: Stipulated penalties for "Foss/Point Wells 2003 Oil Spill."

20 31. In addition to the stipulated penalties and interest as provided in this Section, if
21 the payment required by Section IV of this Consent Decree or the stipulated penalties provided
22 for by this Section are not made, Settling Defendant shall be liable for any costs and attorneys
23 fees incurred by Plaintiffs in collecting any amounts owing.

24 32. Payments due under this Section shall be in addition to any other remedies or
25 sanctions that may be available to the Plaintiffs on account of Settling Defendant's failure to
26 comply with the terms of this Consent Decree.

1 **XI. ENTIRE AGREEMENT**

2 33. This Consent Decree, including Appendices, constitutes the final, complete, and
3 exclusive agreement and understanding between the Plaintiffs and the Settling Defendant with
4 respect to the settlement embodied in the Consent Decree and supersedes all prior agreements
5 and understandings, whether oral or written. No other document, nor any representation,
6 inducement, agreement, understanding, or promise, constitutes any part of this Consent Decree
7 or the settlement it represents, nor shall it be used in construing the terms of this Consent
8 Decree.

9
10 **XII. PUBLIC COMMENT**

11 34. The Parties acknowledge that this Consent Decree will be subject to a public
12 comment period of not less than thirty (30) days. Consequently, entry of the Consent Decree
13 after lodging shall be deferred to allow the time necessary for the United States and the State of
14 Washington to obtain and evaluate public comment on this Consent Decree. The United States
15 and the State of Washington reserve the right to withdraw their consent to this Consent Decree
16 if comments received disclose facts or considerations that show that this Consent Decree is
17 inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this
18 Consent Decree by the Court without further notice. Settling Defendant further agrees not to
19 oppose entry of this Consent Decree by the Court or to challenge any provision of this Consent
20 Decree, unless either the United States or the State of Washington has notified the Settling
21 Defendant in writing that it no longer supports entry of the Consent Decree.

22
23 **XIII. NOTICE**

24 35. Any notice required hereunder shall be in writing and shall be delivered to the
25 following:
26

1 As to the United States:

2 Chief, Environmental Enforcement Section
3 Environment and Natural Resources Division
4 U.S. Department of Justice
5 P.O. Box 7611
6 Washington, D.C. 20044-7611
7 Re: DJ # 90-11-3-08705

8 Cindy Schexnider
9 U.S. Fish and Wildlife Service
10 North Pacific Coast Ecoregion
11 Western Washington Office
12 510 Desmond Dr. SE, Suite 102
13 Lacey, WA 98503-1263

14 As to the State of Washington:

15 Katharine G. Shirey
16 Attorney General's Office
17 2425 Bristol Court SW
18 PO Box 40117
19 Olympia, WA 98504-0117

20 Rebecca Post
21 Natural Resources Unit Supervisor
22 Washington Department of Ecology
23 PO Box 47600
24 300 Desmond Dr.
25 Olympia, WA 98504

26 As to the Suquamish Tribe:

Tom Ostrom
Environmental Program Manager
Suquamish Tribe
Fisheries Department
PO Box 498
Suquamish, WA 98392

Chairman, Suquamish Tribe
Tribal Attorney, Suquamish Tribe
PO Box 498
Suquamish, WA 98392

As to the Settling Defendant:

Frank Williamson
Secretary & General Counsel
Foss Maritime Company
660 West Ewing Street
Seattle, WA 98119

1
2 Austin P. Olney, Esq.
3 Dewey & LeBoeuf LLP
260 Franklin Street
Boston, MA 02110

4 Andrew N. Davis, Ph.D., Esq.
5 Dewey & LeBoeuf LLP
6 Goodwin Square
225 Asylum Street, 13th Floor
Hartford, CT 06103

7
8 36. Each Party to this Consent Decree may change the person(s) it has designated to
9 receive notice for that Party, or the addresses for such notice, by filing a written notice of such
10 change with the Court and serving said notice on each of the other Parties to this Consent
11 Decree.

12 37. Settling Defendant hereby agrees to accept service of process by mail with
13 respect to all matters arising under or relating to this Consent Decree and to waive the formal
14 service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any
15 applicable Local Rules of Civil Procedure and any applicable Local rules of this Court
16 including, but not limited to, service of a summons.

17 **XIV. JUDGMENT**

18 38. Upon approval and entry of this Consent Decree by the Court, this Consent
19 Decree shall constitute a final judgment between the Plaintiffs and the Settling Defendant. The
20 Court finds that there is no just reason for delay and therefore enters this judgment as a final
21 judgment under Fed. R. Civ. P. 54 and 58.

22 **XV. MODIFICATION**

23 39. No material modifications to this Consent Decree may be made unless the
24 Parties to this Consent Decree agree in writing to the modification and the Court approves the
25 requested modification.
26

XVI. SIGNATURES

40. The undersigned representative of the Settling Defendant certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree, to legally execute this Consent Decree, and to bind the party he or she represents to this Consent Decree.

41. This Consent Decree may be signed in counterparts and such counterpart signature pages shall be given full force and effect.

XVII. EFFECTIVE DATE

42. The Consent Decree shall be effective upon the date it is entered by the Court.

DATED this _____ day of _____, 2008.

UNITED STATES DISTRICT JUDGE

Presented by:

Elizabeth Loeb
U.S. DEPARTMENT OF JUSTICE
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044
(202) 616-8916

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THE UNDERSIGNED SETTLING PARTIES entered into this Consent Decree in the matter of The United States of America et al. v. Foss Maritime Company relating to natural resource damages arising from the Point Wells spill.

FOR THE UNITED STATES OF AMERICA

Date: 8/29/08

ELLEN M. MAHAN
Deputy Chief

Date: 9/11/08

ELIZABETH L. LOEB
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

1 FOR THE UNITED STATES OF AMERICA

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3 JEFFERY C. SULLIVAN
United States Attorney

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5
6 Date: September 11, 2008

7 BRIAN C. KIPNIS
Civil Chief
8 United States Attorney's Office
Western District of Washington

1 FOR THE STATE OF WASHINGTON

2 Date: 8-08-2008

3 Name: Dale R. Jensen

4 Title: Spills Program Mgr

5 For Natural Resource Trustee State of Washington

6 Approved as to form:

7 Date: 8-8-08

8 [Signature]

9 Katharine G. Shirey
10 Assistant Attorney General
11 Office of the Attorney General
12 State of Washington

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FOR THE SUQUAMISH TRIBE:

Date: 8-27-08



Leonard Forsman
Tribal Chairman
Suquamish Tribe

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FOR FOSS MARITIME COMPANY:

Date: July 31, 2008

Bruce A. Reed, Jr.
Vice President, Marine Transportation
Foss Maritime Company
660 West Ewing Street
Seattle, WA 98119

1 **Appendix A**

2
3 1. Doe-Kag-Wats Log Removal: Removal of cut logs, some of which have been soaked
4 in creosote, and management of the growth and expansion of the invasive plant *Spartina*
5 *alterniflora*.

6
7 2. Doe-Kag-Wats Berm Enhancement: Construction of a permanent fire pit,
8 approximately four picnic tables, and two garbage cans to establish a formal gathering place at
9 Doe-Kag-Wats.

10 3. Shellfish Enhancement: Seeding of shellfish in intertidal areas of Indianola Beach.

11 4. Indianola Waterfront Preserve Marsh Creation: Re-creation of approximately 0.3 acres
12 of marsh habitat that has been lost due to historic filling practices in the marsh. The project
13 requires excavation of the fill and revegetation of the new marsh area with native vegetation.

14
15 5. Tideland Acquisition: Environmental assessment, analytical investigations, reporting,
16 drafting of a restrictive property deed, and other related internal review and recording
17 processes required for state acquisition of the Bywater Bay Tideland Parcel.